

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING**



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P/S  
  
**74-1678**

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—against—

PHILIP ZANE, JEROME E. SILVERMAN, and  
ROBERT S. PERSKY,

*Defendants-Appellants,*

—and—

MORTON S. KAPLAN, CHARLES FISCHER, RAMON N.  
D'ONOFRIO, and U. S. SECRETARIAL INSTITUTE, LTD.,

*Defendants.*

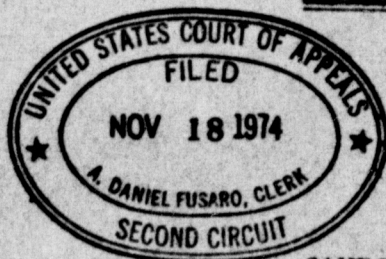
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On Appeal from a Denial of a Motion for a New Trial by  
the United States District Court for the Southern  
District of New York

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PETITION FOR REHEARING AND HEARING *EN BANC*  
ON BEHALF OF APPELLANTS PHILIP ZANE AND  
JEROME E. SILVERMAN

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LOUIS BENDER,  
*Attorney for Appellants Philip Zane  
and Jerome E. Silverman,*  
225 Broadway,  
New York, N. Y. 10007.  
BA 7-6000

SANDOR FRANKEL,  
*Of Counsel.*

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- :

PHILIP ZANE, JEROME E. SILVERMAN, :

and ROBERT S. PERSKY, :

Defendants-Appellants, Docket No. 74-1678 :

-and- :

MORTON S. KAPLAN, CHARLES FISCHER, :

RAMON N. D'ONOFRIO, and U. S. :

SECRETARIAL INSTITUTE, LTD., :

Defendants. :

- - - - -x

PETITION ON BEHALF OF APPELLANTS PHILIP  
ZANE AND JEROME E. SILVERMAN FOR REHEAR-  
ING AND HEARING EN BANC

Appellants Philip Zane and Jerome E. Silverman respectfully petition this Court for a rehearing on the appeal and for a hearing en banc pursuant to Rules 35(b) and 40 of the Federal Rules of Appellate Procedure. This appeal from the District Court's denial of appellant's motion for a new trial based on newly discovered evidence was argued on October 1, 1974 before

a panel of this Court consisting of Circuit Judges Medina, Anderson and Mansfield, and the District Court's order was affirmed in an opinion written for the panel by Circuit Judge Medina on November 4, 1974. (This Court's affirmance of appellants' convictions on appellants' original appeal is reported at 495 F.2d 683, cert. denied 43 U.S.L.W. 3239 (October 22, 1974).)

It is respectfully submitted that the decision of the Court overlooks the controlling principles set forth by the Supreme Court in Mesarosh v. United States, 352 U.S. 1 (1956), and, further, represents a substantial departure from prior decisions of this Court setting forth the standard to be applied in ruling upon a defendant's motion for a new trial based upon newly discovered evidence that a vital Government witness has committed perjury during the course of a defendant's trial.

1. The decision of the panel overlooks the controlling principles set forth by the Supreme Court in United States v. Mesarosh, 352 U.S. 1 (1956).

Appellants Zane and Silverman were convicted on only two counts of a total of thirteen counts in which they were charged with various offenses arising out of their alleged participation in a conspiracy to violate the federal securities laws. As the opinion of the Court recognizes, one of the two primary witnesses against them, Akiyoshi Yamada, "gave ex-



tensive testimony implicating" appellants (Court's opinion, page 2).

Yamada's testimony against appellants was induced by his plea-bargain with the Government through which, in full satisfaction of potential criminal liability for numerous securities frauds whose commission Yamada conceded, he was permitted to plead guilty to three one-count informations before one judge. However, soon after he testified against appellants as a "cooperating" Government witness (and after the jury had returned its verdict in appellants' trial) a further indictment was returned against Yamada, which charged, in substance, the following.

Approximately two weeks after testifying against appellants, Yamada was sentenced by the Hon. Irving Ben Cooper to two years' imprisonment, five years' probation, and a \$30,000 fine for the various offenses to which Yamada had pleaded guilty as part of his agreement with the Government. The indictment alleged that for the next seven weeks after his sentencing, Yamada engineered and perpetrated a scheme to defraud Judge Cooper "by submitting false, forged, fictitious and fraudulent documents and information to the Court" in connection with his subsequent motion before Judge Cooper for reduc-

tion of sentence. To effect this scheme, Yamada was alleged to have caused the sending of numerous letters to Judge Cooper, by various individuals purportedly active in community services, attesting to Yamada's fine character and previous good deeds, and purportedly requesting that leniency be extended by the Court to Yamada. These letters, according to the indictment, were false, forged, and, in at least one instance, typed on stationery whose printing Yamada caused and which bore the name of a non-existent institution. On April 15, 1974, Yamada entered a plea of guilty to Counts 6 and 12-16 of this indictment. In substance, the conspiracy count (Count 6) to which Yamada pleaded guilty charged him with having conspired with others to defraud the United States and Judge Cooper in Judge Cooper's official capacity as a United States Senior District Judge for the Southern District of New York by submitting false, forged, fictitious, and fraudulent documents in support of his motion for reduction of sentence; Counts 12-16, to which Yamada also pleaded guilty, charged him with five substantive offenses of knowingly and wilfully submitting false, fictitious and fraudulent statements to Judge Cooper in support of his motion for reduction of sentence.

Yamada's indictment, and his plea of guilty, revealed that the picture painted at trial of Akiyoshi Yamada --by both Yamada and the prosecutor\*-- as being a reformed, penitent,

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\* Trial Transcript 57 58, 1577, 4009, 4010, 4015.



honest man who, having committed certain crimes before deciding to cooperate with the Government was now fully deserving of belief, willing to bear the punishment imposed by the law and hopeful of starting a new and honest life, was entirely false. For that reason, it is respectfully submitted that appellants are entitled to a new trial under the principles enunciated in Mesarosh, and the Court's opinion in attempting to distinguish this case from Mesarosh overlooks the guiding principles of Mesarosh and the striking similarities between that case and this.

In Mesarosh, petitioners were convicted of a Smith Act violation. While the appeal was pending before the Supreme Court of the United States, the Solicitor General called the Supreme Court's attention to the fact that the "Government, on the information in its possession, now has serious reason to doubt the truthfulness of" testimony given in other judicial proceedings by one of the seven witnesses who had testified against petitioners (352 U.S. at 4). The Solicitor General stated, however, that the Government's position was still that the testimony of the witness given at petitioners' trial "was entirely truthful and credible" (352 U.S. at 4). Under these circumstances the Supreme Court held:

"[The witness]'s credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The

dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." 352 U.S. at 9.

This Court's opinion disposes of the Mesarosh case with the observation that Mesarosh

"did not involve a defense motion for a new trial but rather a sui generis exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General." (Court's opinion, page 6.)

It is respectfully submitted that this overlooks the following controlling similarities between the two cases: in both cases the witnesses' credibility was wholly discredited by the new disclosures (in the instant case the disclosures were confirmed by Yamada's plea of guilty, whereas in Mesarosh the disclosure merely represented the Solicitor General's opinion); in both cases the new disclosures related directly to the witnesses' trial testimony (Yamada having claimed to be a reformed, now-honest man, an assertion for which the prosecutor vouched); and in both cases, the witnesses' lies were made in judicial proceedings. Moreover, the Supreme Court granted the accused a new trial in Mesarosh even in the absence of substantial additional circumstances which were present in the instant case: here, Yamada's perjury was committed within just a few weeks of his testimony against appellants (whereas in Mesarosh certain of



the witness's lies were years removed from his trial testimony); here, Yamada's testimony bore directly upon his motive to lie at appellant's trial, as it was undisputed that both during appellants' trial and during the motion to reduce his own sentence before Judge Cooper, Yamada had been informed of what testimony might prove fruitful to Yamada in mitigating his own punishment.

This Court's opinion, in attempting to distinguish Mesarosh, refers to none of these substantial similarities. The one purported distinction between the two cases upon which this Court relies is that Mesarosh "did not involve a defense motion for a new trial" but an exercise of the Supreme Court's supervisory power "at the instance of representation submitted by the Solicitor General." (Court's opinion, page 6.) It is respectfully submitted that this is a distinction without a difference. The only conceivable relevance of whether the representation of the witness's perjury is made by the Government or by the defense is the degree of certainty of the perjury charged. In this case the falsity of Yamada's testimony concerning his newly discovered honesty, reformation, and veracity, although disclosed to the Court by the defense, was made by accusation of a federal grand jury acting under the guidance of the United States Attorney. Moreover, in the instant case the accusations against Yamada were confirmed by Yamada's plea of guilty to six

counts, whereas in Mesarosh the accusations against the Government's witness rested entirely upon the Solicitor General's assertions. Finally, in Mesarosh the Solicitor General stated to the Court that "the testimony given by [the Government's witness] at the trial was entirely truthful and credible" (352 U.S. at 4); in the instant case, to the contrary, the United States Attorney has never stated subsequently to Yamada's most recent indictment that Yamada's trial testimony was credible, or that Yamada will be called as a Government witness in any other cases in which he had been scheduled to testify for the Government (to the contrary, the Government has admitted that the new disclosures against Yamada have "substantially vitiated his usefulness as a Government witness in any future prosecutions." (see Appendix, page A 61). The Government's reluctance to stand behind Yamada's credibility at this point is understandable, as Yamada's alleged credibility and reformation were thoroughly demonstrated by Yamada's own plea of guilty to have been blatantly false. Thus, in view of the certainty of the evidence of Yamada's new crimes, its disclosure to the Court by the defense rather than by the Government is a factor of no significance United States v. Chisum, 436 F.2d 645 (9th Cir. 1971).



2. The decision of the panel represents a substantial departure from prior decisions of this Court setting forth the standard to be applied in ruling upon a defendant's motion for a new trial based upon newly discovered evidence of a vital Government witness' perjury committed during the course of a defendant's trial.
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This Court's opinion states that the District Court, in exercising its discretion on a motion for a new trial based upon newly discovered evidence, must determine whether the evidence "would probably produce a different result in the event of a new trial"\*, and that the Court of Appeals' function in reviewing the District Court's decision is to determine whether the District Court applied this criterion in a manner that was not "clearly erroneous". (Court's opinion, pages 3-4). However, it is respectfully submitted that the standard for the District Court as set forth in the Court's opinion conflicts with the appropriate standard as set forth by other decisions of this Court, and that under the proper standard appellants

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\* The Court's opinion similarly stated that "We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false." (Court's opinion, page 5)

are clearly entitled to a new trial.

As the District Court stated in denying appellants' motion, Yamada, at trial, "was saying in substance that he had reformed, and was then telling the truth, where shortly thereafter, he was back committing, in substance, perjury." (Appendix, page A-3) The clear inference is that Yamada's testimony regarding his purported reformation was itself perjurious. This Court's opinion states (at p. 5) that "at the time of the [appellants'] trial he may have thought he had reformed." Although Yamada may have thought so, as the Court suggests, it is an equally likely inference that his "reformation" was itself a lie, especially in view of the close proximity between his testimony at appellants' trial and his false statements to Judge Cooper. It is respectfully submitted that in view of the now undisputed falsity of Yamada's alleged "reformation"--as testified to by Yamada and as vouched for by the prosecution (see *supra*, p. 4, n.)--the appropriate criterion for the District Court was not whether the evidence of Yamada's most recent crimes would have produced a different verdict at appellants' trial, but whether there is a "significant likelihood" (United States v. Soles, 482 F.2d 105, 107-108 (2d Cir. 1973)), cert. denied 414 U.S. 1027 (1973) or a "reasonable likelihood"



(United States v. Gugliaro, Docket No. 1089, decided July 19, 1974 (slip op. at 4886)) of a different result, or whether "without the perjury the jury might not have convicted." United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969).

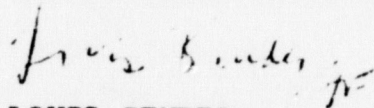
It is respectfully submitted that under the above criteria, applicable to motions for new trial based upon evidence of a Government witness' perjury, and in view of the undisputedly vital role which Yamada's testimony played in appellants' trial, the only reasonable conclusion is that appellants are entitled to a new trial. The newly discovered evidence, if available at appellants' trial, would have been the only evidence of any nature of any crime or other act of misconduct by Yamada subsequent to his alleged "reformation"; as such, it cannot be deemed merely cumulative to evidence of Yamada's other crimes, all of which were committed considerably prior to his "reformation".

"Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case." Mesarosh v. United States, supra at 12.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for a rehearing and for a hearing en banc should be granted.

Respectfully submitted,



LOUIS BENDER  
Attorney for Appellants  
Philip Zane and Jerome E.  
Silverman

SANDOR FRANKEL  
Of Counsel



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U.S. ATTORNEY  
SO. DIST. OF N.Y.

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NOV 18 1974  
PAUL F. GURNEY  
U.S. ATTORNEY  
SO. DIST. OF N.Y.